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No. 03-101

IN THE

Supreme Court of the United States

GAIL NORTON, Secretary of the Interior, *et al.*,
Petitioners,

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENTS SOUTHERN UTAH WILDERNESS ALLIANCE, *ET AL.*

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QUESTIONS PRESENTED

1. Whether the district court had authority under the Administrative Procedure Act, 5 U.S.C. § 706, to consider a claim that BLM failed to satisfy its mandatory duty to prevent the impairment of four specific wilderness study areas.

2. Whether the district court had authority under the Administrative Procedure Act, 5 U.S.C. § 706, to consider a claim that BLM failed to comply with its mandatory duty to "manage the public lands ... in accordance with ... land use plans," when it was undisputed that the agency had not taken the two land use plan actions at issue.

3. Whether the district court had authority under the Administrative Procedure Act, 5 U.S.C. § 706, to consider a claim that BLM violated the National Environmental Policy Act by failing to determine whether significant increases in off-road vehicle use on specified BLM lands in Utah required supplemental environmental analysis.

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDINGS

The parties to these proceedings are listed on page II of Petitioners' Brief. This brief is submitted on behalf of the following Respondents:

Southern Utah Wilderness Alliance
The Wilderness Society
The Sierra Club
The Great Old Broads for Wilderness
Wildlands CPR
Utah Council of Trout Unlimited
American Lands Alliance
The Friends of the Abajos

These Respondents have no parent companies and issue no corporate stock.

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BRIEF FOR RESPONDENTS

Under § 706(1) of the Administrative Procedure Act ("APA"), a court may compel an agency to comply with a mandatory statutory duty to act. Nothing in the language, structure, or history of the APA supports the novel limitations Petitioners (collectively, "BLM") would place on that authority. As the Tenth Circuit recognized, BLM seeks to carve out a "no-man's-land" of unlawful agency inaction that is permanently shielded from judicial review, even when the agency's failure to act causes direct and immediate injury to a legally protected interest – such as the irreversible destruction of some of our nation's few remaining wild lands. Contrary to BLM's arguments, enforcing a mandatory duty to act does not violate the APA's finality requirement or invade protected agency discretion. Nor – BLM's rhetoric notwithstanding – does this remedy intrude into "day-to-day," "ongoing," or "programmatic" agency activities. Established doctrines of administrative law prevent any undue judicial intrusion, *without* creating the no-man's-land of unreviewable and irreparable legal violations posited by BLM.

STATEMENT

I. Statutory and Regulatory Framework.

A. FLPMA's Non-Impairment Mandate.

Concerned about the rapid loss of our nation's last remaining wilderness, Congress enacted the Wilderness Act in 1964 "to assure that an increasing population . . . does not occupy and modify all areas within the United States . . . , leaving no lands designated for preservation and protection in their natural condition." 16 U.S.C. § 1131(a). The 1964 Act provides that "[a] wilderness . . . is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." *Id.* § 1131(c). The Act instructed certain agencies to propose lands for wilderness status; Congress,

however, reserved for itself the sole prerogative to designate an area as "wilderness." *Id.* § 1132(b), (c); *see also* H.R. Rep. No. 88-1538, at 2-3 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3615, 3616-17.

The 1964 Act's wilderness review provisions did not expressly cover the vast public lands under BLM's stewardship. Congress remedied that omission with the Federal Land Policy and Management Act of 1976 ("FLPMA"), which created a comprehensive framework for BLM land management. In FLPMA, Congress directed the Secretary of the Interior to identify BLM roadless areas "having wilderness characteristics," 43 U.S.C. § 1782(a), which are known as Wilderness Study Areas or WSAs. In order to safeguard Congress's statutory prerogative to designate any WSA as wilderness, FLPMA specifically requires BLM to manage WSAs to prevent impairment of their wilderness suitability until such time as Congress has acted:

> [U]ntil Congress has determined otherwise, the Secretary shall continue to manage [WSAs] . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness.

Id. § 1782(c).

As a Department of Justice opinion explains, this provision "explicitly states how the land is to be managed in the interim between the beginning of the study period and the final decision, a period that may last for years." 6 Op. Off. Legal Counsel 63, 64 (1982) (opinion of Ass't Att'y Gen. Theodore Olson). The "provision would be frustrated by irreversible disturbances of the status quo" if the executive branch allowed impairment before final congressional action. *Id.* at 71. Thus, the executive branch lacks authority to disregard Congress's mandate. *Id.* at 63; *see also id.* at 71 ("One of the express congressional purposes for the FLPMA was to reassert Congress' control over federal lands . . .").

BLM gave further specificity to FLPMA's non-

impairment mandate in its binding Interim Management Policy ("IMP") for WSAs, adopted through notice-and-comment rulemaking. *See* CA10 App. 185-246; 44 Fed. Reg. 72,014 (Dec. 12, 1979); *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 739 n.6 (10th Cir. 1982).[1] BLM determined in the IMP that impairment is caused by "surface disturbance," or "any new disruption of the soil or vegetation requiring reclamation." CA10 App. 196. BLM also determined that cross-country use of off-road vehicles ("ORVs") is "surface disturbing because the tracks created by the vehicle[s] leave depressions or ruts, compact the soils, and trample or compress vegetation." *Id.*; *see also id.* at 234-35, 247-48.

Of 23 million acres of BLM lands in Utah, Congress has designated 0.6% as wilderness, while just over 14% have official WSA status.[2] In addition, BLM has identified an additional 2.6 million acres in Utah that would qualify for wilderness or WSA designation but were overlooked during BLM's earlier FLPMA wilderness reviews. These previously overlooked wild lands are commonly called "§ 202 areas," a reference to BLM's long-held view that such areas could be identified as WSAs through the land use planning process set forth in § 202 of FLPMA, 43 U.S.C. § 1712.[3]

B. FLPMA's Land Use Planning Process.

FLPMA also revolutionized the management of *all* BLM lands (not just WSAs) by requiring the agency to develop

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[1] BLM has revised the IMP several times, and has not followed notice-and-comment procedures for some of these revisions. Nevertheless, BLM's conclusions as to the activities that create impairment within the meaning of FLPMA have remained substantially the same since the IMP was initially promulgated. *See* 44 Fed. Reg. at 72,023-24.

[2] BLM, *Utah Wilderness Questions & Answers*, http://www.ut.blm.gov/utahwilderness/q&as.htm.

[3] *See Utah v. Babbitt*, 137 F.3d 1193, 1197-99 (10th Cir. 1998); BLM, *1999 Utah Wilderness Inventory*, http://www.ut.blm.gov/utahwilderness/background.htm.

and adhere to land use plans ("LUPs"). 43 U.S.C. § 1712; *see id.* § 1701(a)(2), (7); 43 C.F.R. § 1601.0-5(k); S. Rep. No. 94-583, at 45-46 (1975). Both the public at large and state and local governments have a right to participate in the process of LUP adoption. 43 U.S.C. § 1712(f); *see* 43 C.F.R. §§ 1610.2, 1610.5-2. Once adopted, an LUP is binding on BLM, which "*shall* manage the public lands . . . in accordance with . . . the land use plans." 43 U.S.C. § 1732(a) (emphasis added); *see also* 43 C.F.R. § 1610.5-3(a) ("All future resource management authorizations and actions . . . shall conform to the approved plan"). BLM may amend or revise an LUP at any time, but only with the same public involvement required for initial adoption. 43 C.F.R. §§ 1610.5-4 to -6.

In addition, Executive Orders issued by Presidents Nixon and Carter require BLM to designate areas and trails under its management as either open or closed to ORVs. Exec. Order No. 11644, 37 Fed. Reg. 2877 (Feb. 8, 1972), *amended by* Exec. Order No. 11989, 42 Fed. Reg. 26,959 (May 24, 1977). BLM's regulations require these ORV designations to occur with public input and as part of the FLPMA LUP process. 43 C.F.R. § 8342.2. Each LUP must designate whether the areas it covers are "open" to unrestricted ORV use, "limited" to specific ORV uses (such as on designated trails), or "closed" to ORVs. These designation decisions must minimize the damage to the environment and wildlife, as well as prevent impairment of a WSA's wilderness suitability. *Id.* § 8342.1. A BLM officer must also immediately close lands to ORV use where the officer determines that such use is causing or will cause "considerable adverse effects" on wilderness suitability. Exec. Order No. 11644; 43 C.F.R. § 8341.2.

C. NEPA and the Supplemental Analysis Requirement.

BLM's land management is also subject to the National Environmental Policy Act ("NEPA"), which declares a "national policy . . . to promote efforts which will prevent or

eliminate damage to the environment." 42 U.S.C. § 4321. NEPA achieves this policy "through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences . . . and that provide for broad dissemination of relevant environmental information." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Accordingly, NEPA forces an agency to analyze and publicize environmental impacts by preparing an environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment" – including LUPs. 42 U.S.C. § 4332(2)(C); *see* 40 C.F.R. §§ 1500.1-1508.28; 43 C.F.R. § 1601.0-6 (requiring preparation of EIS in connection with an LUP). "By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh v. Or. Nat. Resources Council*, 490 U.S. 360, 371 (1989).

An agency's NEPA duties do not end when it completes its initial environmental analysis and approves a federal project. As this Court explained in *Marsh*:

> It would be incongruous with . . . the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval.

Id. Therefore,

> [i]f there remains "major federal actio[n]" to occur, and if . . . new information is sufficient to show that the remaining action will "affec[t] the quality of the human environment" in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.

Id. at 374 (quoting 42 U.S.C. § 4332(2)(C)); *see also* 40 C.F.R. § 1502.9(c) (regulation mandating supplementation); *Marsh*,

490 U.S. at 372 (deferring to regulation).

Thus, in order to determine whether a supplemental EIS ("SEIS") is necessary, "NEPA ... require[s] that agencies take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval." *Marsh*, 490 U.S. at 374 (explaining that the agency must apply a "rule of reason" that "turns on the value of the new information").

II. The Escalating ORV Crisis and BLM's Failure to Act.

This case concerns BLM's failure to carry out its duties under FLPMA and NEPA in response to the recent explosion in ORV use on certain public lands in Utah. ORVs have many "legitimate uses," but they also "frequent[ly] conflict with wise land and resource management practices, environmental values, and other types of recreational activit[ies]." Exec. Order No. 11644. These ORV problems have recently mushroomed. BLM acknowledged in 2000 that "over the past several years, motorized recreation use has increased dramatically," but that BLM has not "carr[ied] out or enforce[d] the motorized O[R]V policies contained in the ... IMP" to prevent impairment of WSAs.[4] The increase in ORV use has been particularly acute on the fragile desert lands managed by BLM in Utah. In 1980, there were just over 9,000 registered ORVs in Utah. By 2000, that number had skyrocketed 900% to more than 83,000. SUWA Rule 28(j) Letter Ex. 2 (Feb. 8, 2002).

As it comes to this Court, this case concerns the destruction caused by the ORV explosion in nine specific areas in Utah managed by BLM – four WSAs and five § 202 areas. *See infra* at 8-10 & n.7; CA10 App. 48 (map).[5] At the time

[4] BLM, *Questions and Answers*, http://www.blm.gov/nhp/news/releases/pages/2000/pr000110_ohv_qa.html; BLM, *National Management Strategy for Motorized Off-Highway Vehicle Use on Public Lands*, http://www.blm.gov/ohv/OHV_FNL.pdf at 20.

[5] The WSAs are (1) Parunuweap, adjacent to Zion National Park and containing the East Fork of the Virgin River gorge, an oasis in an otherwise stark desert environment; (2) Moquith Mountain, home to the Coral Pink Sand Dunes; (3) Behind the Rocks, southwest of Arches National Park and home to spectacular geologic features such as towering redrock fins, knolls, and domes; and (4) Sids Mountain, featuring redrock canyons and native American archaeological sites. The § 202 lands are (1) Parunuweap, adjacent to Parunuweap WSA; (2) Behind the Rocks, adjacent to Behind the Rocks WSA; (3) Indian Creek, near Canyonlands National Park; (4) Wildhorse Mesa, south of Sids Mountain WSA; and (5) Muddy Creek-Crack Canyon, near Capitol Reef National Park and featuring the multicolored bentonite hills of Factory Butte.

SUWA filed this case, LUPs that BLM had adopted between 1980 and 1991 governed the management of these areas. Pet. App. 32a & n.18. None of the NEPA analyses for these LUPs anticipated the rapidly escalating ORV use the areas have witnessed in recent years. As a result, the relevant LUPs left most or all of each of the nine areas in question open to ORV use. In some cases, the LUPs limited ORV use to "existing ways," but even then, because "existing ways" generally were not designated, ORV users proceeded to create ever more "ways," scarring the landscape and converting formerly pristine features like streambeds to ORV raceways. Notwithstanding the substantial increase in adverse environmental impacts from ORVs, BLM has forthrightly admitted that "[u]p to this point the agency has not yet made any formal determination as to whether ... the preparation of a supplemental EIS" is required. CA10 App. 745.

Even before the more recent explosion in ORV use, two of the LUPs for lands at issue did contain provisions addressing the ecological damage done by unrestricted ORV use. The 1991 San Rafael Resource Management Plan ("San Rafael LUP"), which covers parts of the Wildhorse Mesa and Muddy Creek-Crack Canyon § 202 areas, limited ORV use to "designated" roads and trails but did not actually designate those routes. Instead, the LUP committed BLM to designate the routes by 1992 in a separate San Rafael Route

Designation Plan. *Id.* at 100, 648A-D, 650. Similarly, in light of damage from ORVs in the Factory Butte area, the 1990 Henry Mountains ORV Implementation Plan ("Henry Mountains LUP") obligated BLM to conduct an intensive ORV monitoring program to determine whether the agency's ORV regulation required ORV use to be restricted. *Id.* at 106-07; Pet. App. 25a. Yet when SUWA filed this case – *nearly a decade* after BLM adopted these two LUPs – the agency admitted that it had not carried out either commitment. Pet. App. 25a-26a; CA10 App. 4, 6, 503-05.

Given the agency's inaction in the face of the ORV crisis, BLM was forced to admit that "[i]mpairment has been, and continues to be caused by ORVs" in each of the four specific "Utah BLM managed wilderness study areas" at issue here. Cert. Opp. App. 59. That is, BLM conceded not only the devastating impact of ORVs, but actual "impairment," which FLPMA requires BLM to prevent. That admission is borne out by extensive record evidence of devastation by ORVs in all nine of the relevant WSAs and § 202 areas. *See, e.g.*, Ex. 3G, Prelim. Inj. Hr'g (July 11, 2002) (photographic evidence of scars to landscape caused by ORVs in these areas); CA10 App. 72, 460-61 (same); Pet. App. 61a-62a, 65a.

III. Procedural History.

A. District Court Proceedings.

Alarmed by this escalating and irreversible destruction, SUWA wrote to and met with the responsible BLM officials to demand that the agency comply with its legal duties concerning ORV use on Utah lands. Cert. Opp. App. 50-57. When BLM still did not comply, SUWA commenced this suit in late 1999, seeking declaratory and injunctive relief under § 706(1) of the APA to remedy BLM's unlawful failure to act.[6] After filing suit, SUWA moved for a preliminary injunction to preserve the status quo and prevent further

[6] Unless otherwise indicated, all citations to statutory sections in this brief are to the APA as codified in title 5 of the United States Code.

irreparable harm, singling out from the broader set of lands covered by the complaint the nine specific areas described above, and seeking immediate closure of those areas to ORVs. SUWA's preliminary injunction motion was predicated on several claims in SUWA's ten-count complaint, three of which are relevant here: that BLM had failed to act to prevent ORVs from impairing the wilderness suitability of WSAs, as required by FLPMA; that BLM had failed to act in conformity with approved LUPs, as required by FLPMA; and that BLM had failed to determine (*i.e.*, take a "hard look" at) whether it must prepare SEISs in response to the ORV explosion, as required by NEPA. CA10 App. 35-37 (Fifth, Sixth, and Seventh Causes of Action).

In opposing preliminary relief, BLM took the legal position that the undisputed impairment caused by ORVs in the four WSAs, Cert. Opp. App. 59, did not violate FLPMA's non-impairment mandate because the *entire* WSA had not been impaired. 8/30/00 Tr. vol. III 605 (asserting that FLPMA requires BLM to prevent impairment only "on a whole WSA basis"); 8/29/00 Tr. vol. II 305-06; 8/28/00 Tr. vol. I 29. BLM also contended that impairment is legally permissible if the impacts will "eventually disappear." 8/30/00 Tr. vol. III 508-09.

The respondent ORV Groups intervened and moved under Rule 12(b)(1) to dismiss the three counts of SUWA's complaint described above insofar as those claims pertained to the nine areas for which SUWA was seeking preliminary relief. CA10 App. 421; Pet. App. 75a-76a. BLM expressly declined to join in that motion. Pet. App. 57a.

After hearing testimony, the district court concluded that SUWA had presented "significant evidence" that impairment "is occurring in the WSAs due to ORV use." *Id.* at 65a. Nevertheless, based largely on the fact that BLM had taken some tentative steps to address the ORV problem and has some discretion about exactly how to satisfy its mandatory duties, the district court granted the ORV Groups'

motion to dismiss SUWA's Fifth, Sixth, and Seventh claims with prejudice – but *only* "to the extent these claims pertain to the [four] WSAs and [five] § 202 Areas addressed during the preliminary injunction hearing." *Id.* at 75a. The court denied SUWA's preliminary injunction motion as moot in light of that jurisdictional ruling. *Id.* at 76a. Finally, the court certified its partial dismissal of SUWA's complaint as a final appealable judgment pursuant to Rule 54(b). CA10 App. 878.[7]

B. The Tenth Circuit's Decision.

The Tenth Circuit reversed and remanded. In an opinion by Judge Ebel, the court stated that under § 706(1), "federal courts may order agencies to act only where the agency fails to carry out a mandatory, nondiscretionary duty," and concluded that each of the three duties SUWA seeks to enforce is mandatory and non-discretionary. Pet. App. 10a; *see id.* at 5a, 26a, 34a-35a, 38a. While BLM may have discretion about *how* to satisfy these duties, that discretion is relevant to the nature and scope of potential relief rather than to the court's § 706(1) jurisdiction. *Id.* at 12a-15a.

The Tenth Circuit also rejected BLM's argument that § 706(1) allows courts to compel only specific final agency action. The court observed that under § 706(1), the finality requirement applies to the agency's *inaction* on review (not, as BLM contended, to the action to be compelled):

> Where, as here, an agency has an obligation to carry out a mandatory, non-discretionary duty and either fails to meet an established statutory deadline for carrying out

[7] Thus, the district court's final appealable judgment – and the scope of this appeal in the Tenth Circuit and this Court – is limited to the dismissed claims pertaining to the nine specific areas. The district court also dismissed SUWA's First Claim for Relief as to those nine areas, but SUWA did not appeal that aspect of the ruling. SUWA 10th Cir. Br. 6 n.4. Finally, the district court granted SUWA's own motion to dismiss its Ninth Claim for Relief without prejudice. Pet. App. 76a.

> that duty or unreasonably delays . . . , *the failure to carry out that duty is itself "final agency action."*

Id. at 16a (emphasis added). BLM's view, the court explained, "would seem to create a 'no-man's-land' of judicial review, in which a federal agency could [flout] mandatory, nondiscretionary duties." *Id.* at 18a n.10.[8]

The court also rejected the argument that an agency can immunize itself from § 706(1) review by taking some steps – no matter how insubstantial or ineffective – toward satisfying its statutory mandate. While "BLM should be credited for the actions it has taken to comply with the nonimpairment mandate, . . . it does not follow [that those steps] . . . deprive[] a court of subject matter jurisdiction to determine whether [BLM] has actually fulfilled the statutorily mandated duty and potentially compel action if that duty has not been fulfilled." *Id.* at 20a.

Judge McKay concurred that courts have jurisdiction under § 706(1) to enforce NEPA's "hard look" requirement, *id.* at 39a, but dissented as to the FLPMA non-impairment and LUP claims because he believed that § 706(1) jurisdiction is limited by traditional mandamus standards, which in his view "require[] that the duty challenged be ministerial in nature." *Id.* at 45a.[9]

C. BLM's Post-Complaint Actions.

Prior to the filing of this suit in 1999, BLM took largely tentative, non-final steps to address the ORV crisis, such as meeting with ORV user groups to urge them to exercise re-

[8] BLM misleadingly states that the Tenth Circuit "concluded that the 'agency action' that may be compelled under Section 706(1) includes . . . 'day-to-day management actions' such as BLM's ongoing management of the wilderness study areas." BLM Br. 7 (citing Tenth Circuit opinion). In fact, the Tenth Circuit quoted the phrase "day-to-day management actions" from BLM's description of its own position. The court never endorsed the view that such actions are in any way at issue.

[9] After remand to the district court – but before this Court granted certiorari – SUWA filed a third amended complaint. Cert. Opp. App. 27-47.

straint. Faced with judicial scrutiny, however, BLM has taken some more definitive action concerning ORVs since this suit commenced. Pursuant to 43 C.F.R. § 8341.2, BLM issued temporary emergency closure orders for the Parunuweap, Behind the Rocks, and Sids Mountain WSAs that limited ORVs to certain designated routes.[10] For the Moquith Mountain WSA, BLM amended its LUP to close additional areas.[11]

After SUWA sued, BLM also took action to comply with its LUP duties by initiating the long-promised monitoring program at Factory Butte, Pet. App. 31a n.17, and, more recently, releasing the long-overdue San Rafael Route Designation Plan.[12] BLM has not, however, taken any action to comply with its "hard look" duty under NEPA.[13]

The Tenth Circuit instructed the district court to consider mootness on remand, cautioning, however, that mootness does not automatically follow from voluntary cessation of challenged activity. Pet. App. 31a n.17.

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[10] 65 Fed. Reg. 52,437 (Aug. 29, 2000) (Parunuweap); 66 Fed. Reg. 6659 (Jan. 22, 2001) (Behind the Rocks); 65 Fed. Reg. 15,169 (Mar. 21, 2000) (Sids Mountain).

[11] 65 Fed. Reg. 19,921 (Apr. 13, 2000).

[12] BLM, *San Rafael Route Designation Plan*, http://www.ut.blm.gov/sanrafaelohv/wtheplan.htm.

[13] Thus, each of the BLM actions recited by the ORV Groups was *either* tentative and non-final, *or* occurred after SUWA commenced this action. *See* ORV Groups Br. 8. The one exception is a 1998 emergency closure of the Indian Creek § 202 area, which limited ORV travel to existing ways (without identifying those ways). However, SUWA's sole claim concerning Indian Creek is that BLM has violated NEPA by failing to take a "hard look" at whether to prepare an SEIS. The 1998 emergency closure order did not purport to address that obligation (and a new analysis might propel BLM to make further, or permanent, closures).

SUMMARY OF ARGUMENT

The Court of Appeals correctly held that the district court has jurisdiction to consider SUWA's three inaction claims concerning the devastation by ORVs of nine specific WSAs and § 202 areas. BLM acknowledged that ORV use is impairing the four WSAs and causing unforeseen impacts to fragile public lands in all nine areas. Given those facts, the court below was right to reject BLM's contention that federal courts altogether lack jurisdiction to determine whether the agency's failure to meet this crisis is violating acts of Congress and to enter general orders compelling compliance with the law for such violations.

1. Under FLPMA, BLM has a mandatory duty to manage WSAs so their wilderness suitability is not impaired. Section 706(1) of the APA provides a remedy when the agency's failure to act violates that mandatory duty. The APA authorizes judicial review of all "final agency action" and defines "agency action" to include an agency's partial or total "failure to act." Section 706(1) defines the scope of the judicial review and remedy for an agency's final failure to act, just as § 706(2) does for an agency's final affirmative actions. Together, these provisions cover the universe of reviewable agency action and inaction, as Congress intended. The novel restrictions proposed by BLM would establish a "no-man's-land" of agency inaction that is both unlawful and immediately harmful, yet unreviewable. Indeed, BLM unabashedly contends that review of its unlawful failure to prevent the irreversible impairment of WSAs will *never* be available so long as the agency's inaction continues. That contravenes the APA and common sense.

BLM's argument that inaction is redressable under § 706(1) only when the act to be compelled would constitute final agency action has it backwards. Under the APA, it is the matter to be reviewed – not the action to be compelled – that must be final. The APA's plain language, decades of case law, and pre-APA mandamus practice all make clear

that judicial review of inaction is available when that *inaction* is final, regardless whether the affirmative action to be compelled as a remedy would also be final. Under the APA's flexible and pragmatic conception of finality, inaction – like affirmative action – is final when it is sufficiently consequential and definitive. BLM's failure to act is final here both because FLPMA creates a continuous duty to avoid impairment and because BLM's failure to do so is daily causing irreparable harm to the interests Congress sought to protect.

Equally spurious is BLM's contention that its unlawful inaction is immune to review because the agency has some discretion about how to satisfy FLPMA's non-impairment mandate. BLM's discretion concerning *how* to comply with FLPMA cannot be expanded into unreviewable discretion *not* to comply. BLM makes no serious attempt to ground this proposed restriction in the APA itself. Instead, BLM points to pre-APA mandamus practice in an attempt to narrow the APA. Yet – as BLM is forced to admit – mandamus was historically available to compel an agency to comply with a legal duty involving discretion so long as the court ordered the agency to comply with the duty without telling it how to exercise its discretion. That is entirely consistent with enforcing FLPMA's non-impairment mandate through an order compelling BLM to comply without telling it how.

Nor does the mere fact that BLM took some tentative – albeit ineffective – action bar relief. FLPMA does not just require BLM to take *some* action, but instead mandates that the agency manage WSAs so their wilderness suitability is *not impaired*. The APA confers judicial power to compel the agency to comply with its actual statutory duty – a duty that BLM took no final and reviewable steps to satisfy until after this suit was filed. At the same time, whether the agency's *post-complaint* actions moot SUWA's claims is a difficult issue the district court should address on remand, taking into account the doctrine that voluntary cessation of illegal-

ity does not always bar relief.

Finally, notwithstanding BLM's rhetoric, the jurisdiction of courts under the APA to review and remedy unlawful agency inaction does not intrude on "ongoing," "day-to-day," or "programmatic" agency affairs. The limits on review Congress actually provided in the APA – not some newly minted immunity – are a complete answer to such concerns.

2. Section 706(1) also provides a remedy when BLM fails to take specific actions required by LUPs that the agency has formally promulgated after public input. The plain language of FLPMA imposes a mandatory duty to adhere to LUPs, and the two LUP provisions at issue created mandatory duties to act. Nothing supports BLM's bare assertion that the duty to abide by an LUP is one-sided and constrains BLM only when it acts to protect public lands from ORVs and is challenged by ORV users, but not when it fails to act to provide such protection and is challenged by those who seek to preserve an area's wilderness character.

3. Finally, as this Court held in *Marsh*, NEPA requires agencies to make a determination – *i.e.*, take a "hard look" at – whether new information arising in the context of ongoing major federal action requires preparation of an SEIS. That is also a mandatory duty that may be enforced under § 706(1). The supplemental "hard look" duty can be enforced not only when the agency does something new or changes course, but also when the agency still *can change course* in ongoing action in response to new information, as it can here. In this context, NEPA is literally "action forcing." Moreover, there is no merit to BLM's contention – which it did not raise before the Tenth Circuit – that BLM's ongoing management pursuant to an LUP does not constitute ongoing major federal action that, when combined with changed circumstances, can trigger a duty to prepare an SEIS.

ARGUMENT

I. Section 706(1) Provides a Remedy for BLM's Inaction Violating FLPMA's Non-Impairment Mandate.

"[I]n the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985). BLM contends, however, that it is free to disregard its mandatory duty under FLPMA to prevent impairment of the wilderness suitability of WSAs. BLM asserts that the FLPMA duty "is not judicially enforceable under Section § 706(1)" – no matter what. BLM Br. 10-11. It thus stakes out the extreme position that its disregard of the duty imposed by Congress will *never* be reviewable so long as BLM does not take final agency action subject to review under § 706(2). That position is untenable. As Judge Easterbrook observed in this context:

> Only in the world of Kafka would a court dismiss a claim that an agency has taken too long to reach a decision on the ground that the agency has yet to reach a decision – and that the aggrieved party can't complain until it does (by which time, of course, the claim will be moot).

Valona v. United States Parole Comm'n, 165 F.3d 508, 510 (7th Cir. 1998).

A. The Language, Structure, and Purpose of the APA Plainly Provide for Review Here.

Section 706(1) provides, in simple and unambiguous terms, that "[t]he reviewing court shall ... compel agency action unlawfully withheld or unreasonably delayed." § 706(1). "Agency action," in turn, is defined broadly to encompass the full sweep of agency activity, including failures to act. *See* § 551(13) ("'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"); *FTC v. Standard Oil Co.*, 449 U.S. 232, 238 n.7 (1980) (explaining that

broad definition of "term 'agency action' ... assure[s] the complete coverage of every form of agency power, proceeding, action, or inaction," and "includes the supporting procedures, findings, conclusions, or statements or reasons or basis for the action or inaction") (quotation marks omitted). On its face, this capacious language provides a remedy when BLM unlawfully withholds agency action needed to satisfy FLPMA's mandate that the agency "continue to manage [WSAs] so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c).

This straightforward reading of § 706(1) is confirmed when the provision is placed in context and the APA is read as a whole. The APA's "review provisions" are "generous," and their "purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes like" FLPMA. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955); *accord Bennett v. Spear*, 520 U.S. 154, 163 (1997). Thus, the Court has "construed [the APA] not grudgingly but as serving a broadly remedial purpose." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 156 (1970). And it has repeatedly recognized the APA's "basic presumption" in favor of judicial review, requiring that "judicial review of a final agency action ... not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967); *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); S. Rep. No. 79-752, at 193 (1945) (APA provides system of "judicial review designed to afford a remedy for every legal wrong"); H.R. Rep. No. 79-1980, at 275 (1946).[14]

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[14] The APA's normal presumption of reviewability is subject to a narrow exception for agency decisions not to commence or prosecute enforcement proceedings. *See Heckler*, 470 U.S. at 831. BLM does not even try to argue that this exception applies here, however, because SUWA is not seeking to compel any type of enforcement proceeding. In any event, even if *Heckler*'s limited presumption of unreviewability applied, that

The APA's generous review provisions extend equally to agency *inaction*. Congress expressly defined "agency action" to include not only affirmative actions, but also an agency's "failure to act."[15] § 551(13); *see Standard Oil*, 449 U.S. at 238 n.7. Section 706(1) is integral to the APA's approach of treating failures to act as a type of agency action because it allows "properly interested parties to compel agencies to act where they improvidently refuse to act." S. Rep. at 214; H.R. Rep. at 278 (same). The key prerequisite, as the Tenth Circuit recognized, is the presence in a statute (whether the APA itself or another law) of a "mandatory, nondiscretionary duty." Section 706(1) thus complements § 706(2), which authorizes "[t]he reviewing court" to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." § 706(2)(A). Together, these two sections provide remedies for the universe of reviewable agency action and inaction.

In the APA, Congress did create three express limits on judicial review of agency action and inaction. First, Congress can bar judicial review either by expressly precluding review in a statute or by "committ[ing]" a matter "to agency discretion by law." § 701(a). Second, the plaintiff must have standing – *i.e.*, be "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." § 702. Third, absent some specific statutory provision to the contrary, only "*final* agency action for which there is no other adequate remedy in a court [is] subject to judicial review." § 704 (emphasis added). By adopting these and no other structural limitations, Congress

presumption would rebutted, and BLM's inaction would be reviewable, because Congress has circumscribed the agency's discretion with substantive standards providing "law to apply." *Id.* at 830; *see infra* at 29.

[15] This brief uses the term "affirmative" agency action for any agency action other than a "failure to act." The term thus encompasses express denial of relief, in contrast to *de facto* denial through inaction.

struck a balance between preventing undue judicial intrusion into agency decisionmaking and assuring that unlawful or arbitrary agency actions are subject to judicial review and correction when they cause real-world injury, such as impairment to WSAs.

BLM does not claim that the first two limits bar review. And, as we show immediately below, the APA's finality requirement is met here as well. Because the terms of § 706(1) and the limits on judicial review enacted in the APA are satisfied, BLM's unlawful failures to act are subject to review in this case.

B. For § 706(1) Review, the Agency's Failure to Act Must Be Final – Regardless Whether the Action to Be Compelled Would Also Be Final.

BLM contends that its unlawful failure to comply with FLPMA's non-impairment mandate is exempt from review because only agency actions that are themselves final may be compelled under § 706(1). But the law is clear that the APA's finality requirement applies to the *inaction* to be *reviewed*, not the *affirmative action* to be *compelled* as a remedy. The finality requirement thereby prevents premature judicial review of agency inaction or delay, but also permits immediate review where the agency's inaction is sufficiently definitive and has direct real-world consequences.

1. The APA's Text, Decades of Well-Established Law, and Pre-APA Mandamus Practice All Demonstrate That the Finality Requirement Applies to the Agency's Inaction.

Section 704 of the APA provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." Section 551(13), in turn, defines "agency action" to "include[] . . . failure to act." Putting these two provisions together, an agency's "final [failure to act] for which there is no other adequate remedy in a court [is] subject to judicial review." Thus, even with-

out recourse to § 706(1), the APA authorizes judicial review of an agency's inaction – if the failure to act is final.

Section 706(1) provides the remedy in such a case: "[t]he reviewing court shall (1) compel agency action unlawfully withheld or unreasonably delayed." Plainly, under § 706(1) the agency action to be *compelled* as a remedy is *different* from the agency action – the failure to act – that is being *reviewed*. Just as plainly, § 704 imposes the finality requirement on the failure to act – the "agency action . . . subject to judicial review" – not on the affirmative action to be compelled.[16]

BLM nevertheless insists that the Court should insert the word "final" into the text of § 706(1) to modify the action to be compelled as a remedy – as if the statute said that "the reviewing court shall (1) compel [final] agency action unlawfully withheld or unreasonably delayed." But BLM's view has no textual support: § 704 imposes the finality requirement on the agency action to be reviewed, not the remedy, and under § 706(1) the agency action subject to judicial review is the failure to act, not the affirmative action compelled. *See, e.g., Costle v. Pac. Legal Found.*, 445 U.S. 198, 220 n.14 (1980) (under § 706(1), party "may obtain judicial review of . . . agency inaction").

BLM also suggests that, even apart from § 704's finality requirement, the scope of § 706(1) is limited by the definition of "agency action" in § 551(13). That is incorrect. A finality requirement cannot be smuggled into the definition of "agency action" itself. *See supra* at 16 (discussing breadth of "agency action"); *Whitman v. Am. Trucking Ass'ns*, 531

[16] In contrast, affirmative agency action is what is generally subject to judicial review under § 706(2), so under that provision the agency's affirmative action must be final to be reviewable. Thus, under both § 706(1) and § 706(2), the finality requirement applies to the "agency action" that is to be reviewed. Therefore, contrary to BLM's suggestion, BLM Br. 16, this straightforward and logical reading does not give "agency action" different meanings in § 706(1) and § 706(2).

U.S. 457, 478 (2001) ("The bite in the phrase 'final action' . . . is not in the word 'action,' which is meant to cover comprehensively every manner in which an agency may exercise its power. . . . It is rather in the word 'final' . . ."). Finality is not required by § 551(13), but rather by § 704, which would be rendered superfluous under BLM's view.

This straightforward reading of the statute is confirmed by *decades* of decisions from the courts of appeals. BLM is unable to cite a single case adopting its position that § 706(1) does not apply unless the action to be compelled is itself final. Rather, courts have uniformly applied the finality requirement to the agency's failure to act that is under review.[17] As the Fourth Circuit explained decades ago:

> When a party suffers a legal wrong from continuing agency delay and, as here, there is no other adequate administrative or judicial remedy, *the delay is final agency action* for which [the APA] does provide an effective remedy.

Deering Milliken, Inc. v. Johnston, 295 F.2d 856, 861-66 (4th Cir. 1961) (emphasis added). And the D.C. Circuit recently explained:

> [W]here an agency is under an unequivocal statutory duty to act, *failure so to act constitutes*, in effect, an affirmative act that triggers *final agency action* review. Were it otherwise, agencies could effectively prevent judicial review of their policy determinations by simply refusing to take final action.

Cobell v. Norton, 240 F.3d 1081, 1095 (D.C. Cir. 2001) (emphasis added) (quotation marks and citations omitted) (citing, *e.g., Public Citizen Health Research Group v. Comm'r, FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984) ("At some point administrative

[17] On occasion, courts have loosely stated that § 706(1)-type review is an "exception" to the finality requirement. *See, e.g., Action on Smoking & Health v. Dep't of Labor*, 28 F.3d 162, 163-64 (D.C. Cir. 1994). But that conflicts with the plain language of § 704.

delay amounts to a refusal to act, with sufficient finality and ripeness to permit judicial review") (quotation marks omitted)).[18]

Pre-APA mandamus law – which BLM itself asserts § 706(1) "codified" – also refutes BLM's claim that courts may compel only a final agency action. A clear example is *United States v. Los Angeles & Salt Lake Railroad Co.*, 273 U.S. 299 (1927), in which the plaintiff challenged the accuracy of an asset valuation that the ICC was required by law to perform as a step to further agency action. The Court, per Justice Brandeis, held that the valuation was not itself a final action subject to judicial review. *Id.* at 310. Nevertheless, the Court observed that if the ICC failed to make any valuation at all, the plaintiff had "the remedy by mandamus to compel the Commission to make a finding" as required by statute. *Id.* at 311. Thus, mandamus could be used to command agencies to fulfill their statutory obligations, even if the action ordered would not itself be final and reviewable agency action. *See also, e.g., ICC v. United States ex rel. Humboldt S.S. Co.*, 224 U.S. 474, 477-79 (1912) (granting mandamus ordering agency to take non-final action by assuming jurisdiction over common carrier), *cited in* United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 108 (1947) ("A.G.'s Manual").[19] Indeed, as these cases illustrate, compelling non-final

[18] *See also, e.g., Thompson v. United States Dep't of Labor*, 813 F.2d 48, 52-53 (3d Cir. 1987); *Sierra Club v. Peterson*, 228 F.3d 559, 568 (5th Cir. 2000) (en banc); *Ligon Specialized Hauler, Inc. v. ICC*, 587 F.2d 304, 314 (6th Cir. 1978); *Home Builders Ass'n of Greater Chicago v. United States Army Corps. of Eng'rs*, 335 F.3d 607, 616 (7th Cir. 2003); *Houseton v. Nimmo*, 670 F.2d 1375, 1377-78 (9th Cir. 1982); *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1238 (11th Cir. 2003); Peter H.A. Lehner, Note, *Judicial Review of Administrative Inaction*, 83 Colum. L. Rev. 627, 652-55 (1983).

[19] *ICC v. New York, New Haven & Hartford Railroad Co.*, 287 U.S. 178 (1932), on which BLM relies, is not to the contrary. That case simply held that mandamus does not lie to compel the ICC to value property in a *particular* manner. *See also infra* at 30-31.

actions that are mandated by Congress but unlawfully withheld by the agency may be necessary to ensure that subsequent final action occurs.[20]

2. BLM's Inaction Is "Final" Because It Is Sufficiently Consequential and Definitive.

As applied to agency inaction, just as to affirmative action, the APA's finality requirement is both "pragmatic" and "flexible." *Abbott Labs.*, 387 U.S. at 149-50. Its function is to forestall premature judicial intrusion into agency affairs, while still allowing review when necessary to preserve substantial rights. One aspect of this pragmatic inquiry is whether the agency's action or inaction has "direct consequences." *Franklin v. Mass.*, 505 U.S. 788, 798 (1992). Ordinarily, review is immediately available when the effects of agency conduct are "felt in a concrete way by the challenging parties" such that "withholding court consideration" would cause them "hardship." *Abbott Labs.*, 387 U.S. at 148-49; *see also Bennett*, 520 U.S. at 178 (to be final, "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow") (quotation marks omitted). In contrast, where some further step is needed before there will be real-world effects, review will deferred. *E.g., Franklin*, 505 U.S. at 798.

A second aspect of finality looks to whether the agency's action is "definitive," rather than "informal, or only the ruling of a subordinate official, or tentative." *Abbott Labs.*, 387 U.S. at 151 (citations omitted); *see also Bennett*, 520 U.S. at 177-78 ("the action must mark the consummation of the

[20] Of course, § 706(1) is frequently used to compel the agency to take an action that would be final and reviewable under § 706(2). In such cases, a court with exclusive jurisdiction to review the agency's final affirmative action also has exclusive jurisdiction to compel the agency to take such action. *See, e.g., Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75-76 (D.C. Cir. 1984) (deriving exclusive jurisdiction from mandamus principles); A.G.'s Manual at 108. That in no way restricts the use of § 706(1) to such situations.

agency's decision making process – it must not be of a merely tentative or interlocutory nature") (quotation marks and citation omitted). Consistent with the pragmatic nature of finality, the courts of appeals have recognized that in inaction cases this second aspect of finality is satisfied when the agency's failure to act is sufficiently "definitive." *See, e.g., Nat'l Parks*, 324 F.3d at 1239-40 (referring to "inaction that can be said to mark the consummation of the agency's decisionmaking process") (quotation marks omitted); *see also supra* at 21 & n.18.

Based on these two considerations, at least four relevant (and sometimes overlapping) scenarios in which courts deem inaction to be final emerge from the case law. BLM's inaction with respect to its non-impairment duty – its failure to manage the four WSAs at issue so as not to impair their wilderness suitability – qualifies as "final," and thus reviewable, under each of these four categories.

First are cases in which the agency is under a mandatory duty that does not give the agency discretion to defer action. The paradigm is when the agency fails to meet a specific *statutory deadline* to take action, because a deadline set by Congress creates a clear point at which the agency's failure to act becomes definitive and final. As this Court has noted, a statute stating that an agency "shall" do something within a set period of time is not discretionary and may be enforced under § 706(1). *Brock v. Pierce County*, 476 U.S. 253, 260 n.7 (1986); *see also, e.g., In re Ctr. for Auto Safety*, 793 F.2d 1346, 1353 (D.C. Cir. 1986) (if statute "designates a specific deadline for agency," then "failure to meet the statutory requirement is 'not in accordance with law'"); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190-93 (10th Cir. 1999).

The Tenth Circuit correctly held that BLM's inaction is final under this category. The non-impairment provision in FLPMA imposes a *continuous* mandatory duty that is equivalent to an express deadline. Pet. App. 9a-10a n.5, 17a & n.9. This is reflected not just in the statutory language, 43

U.S.C. § 1782(c) (mandating that BLM "*shall continue* to manage such lands . . . so as not to impair the suitability of such areas for preservation as wilderness") (emphasis added), but also in the very nature of the duty imposed. Once an area is identified as a WSA, BLM is responsible for maintaining the status quo to protect Congress's prerogative to make a wilderness designation at any time. Thus, this particular mandate – like a deadline, but unlike many duties imposed on agencies – does *not* give BLM discretion to put off action and attend to the matter later. By the time impairment occurs, it is already too late.[21]

Second, inaction is also final and reviewable when it threatens *imminent irreparable harm* to a legally protected interest. As the D.C. Circuit explained over three decades ago, in the ordinary case "relief delayed is not . . . equivalent to relief denied." *Envtl. Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 & n.29 (D.C. Cir. 1970). But where delay results in "irreparable harm" that cannot – by definition – be remedied by later judicial review, then the agency's "inaction results in a final disposition of such rights as the petitioners and the public may have." *Id.* Under such circumstances, "administrative inaction has precisely the same impact on the rights of the parties as denial of relief," rendering it final under the APA. *Id.*; *accord Cobell*, 240 F.3d at 1097; *Sierra Club v. Thomas*, 828 F.2d 783, 795 (D.C. Cir. 1987); *Envtl. Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 589-90 & n.8 (D.C. Cir. 1971).

Here, BLM's inaction irreparably harms the wilderness suitability of the four WSAs, thereby "result[ing] in a final

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[21] The ORV Groups suggest that SUWA could have challenged the relevant land use plans at the time of their adoption for violating FLPMA's non-impairment mandate. ORV Groups Br. 5. This suggestion ignores the fact that BLM adopted the relevant plans many years earlier when ORV use was much less intensive and no non-impairment claim could legitimately have been raised. SUWA's claim arose only when ORV use had increased past the point of impairment.

disposition of such rights as the petitioners and the public may have." *Hardin*, 428 F.2d at 1099. In this particular case, this ground of finality is related to the first – Congress gave BLM no discretion to defer action to prevent impairment precisely because impairment is irreparable once it occurs.

Third, inaction is final where *legal error* causes the agency to abdicate its duty. In such cases, the agency's failure to act does not result from discretionary priorities or the need for further work on a problem, but from the agency's legally erroneous view that it has no duty to act. *E.g., Adams v. Richardson*, 480 F.2d 1159, 1163-64 (D.C. Cir. 1973) (en banc); *see Firebaugh Canal Co. v. United States*, 203 F.3d 568, 573, 577-78 (9th Cir. 2000); *see also infra* at 30-31 (discussing *Humboldt*, 224 U.S. at 485). BLM's inaction here reflects this kind of legal error. BLM argued below that it has no legal duty to prevent impairment that is limited to only part of a WSA or that will "eventually disappear." *Supra* at 9. Courts have jurisdiction to correct such errors and order the agency to act in compliance with the mandatory duty actually imposed by Congress.

Fourth, even where a statute does not demand immediate action, irreparable harm is not threatened, and there is no legal error, an agency still has a general and mandatory duty to act on matters within a "reasonable time" – an obligation that is imposed by the APA, 5 U.S.C. § 555(b), and often arises from other statutes as well. *See, e.g., Thomas*, 828 F.2d at 794. By its nature, the general "reasonableness" standard for timely action, where applicable, gives an agency considerable discretion in ordering its own priorities, unless the delay becomes sufficiently egregious that a court will find final inaction. *See, e.g., Int'l Nat. Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 57-58 (D.C. Cir. 2002) (stating that judicial review of agency inaction in this area "is highly deferential"); *Cobell*, 240 F.3d at 1096; *Caswell v. Califano*, 583 F.2d 9, 15-16 (1st Cir. 1978). Courts generally apply a "rule of reason" guided by six so-called *"TRAC* factors," under

which the reasonableness of the delay turns in part on the statutory scheme and the interests prejudiced by delay. *See Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (*"TRAC"*). In this case, even if the first three categories did not dictate a finding of finality, BLM's long delay in acting to prevent impairment is sufficiently unreasonable to make review appropriate. *Supra* at 8.[22]

C. Section 706(1) Provides a Remedy to Enforce a Mandatory Duty Even Where the Agency Has Discretion Concerning *How* to Comply.

In addition to its finality argument, BLM contends that a court can compel agency action under § 706(1) only if the agency is under a specific duty to perform a particular act. *E.g.*, BLM Br. 26 (*"precise, definite act* that [the agency] ha[s] no discretion whatever not to perform") (emphasis added) (quotation marks omitted). BLM's position seems to be that even though the non-impairment duty is mandatory and leaves BLM no discretion to allow impairment, that duty still cannot be enforced under § 706(1) because the agency has discretion *how* to satisfy it. This effort by BLM to preclude judicial scrutiny of its unlawful failure to meet Congress's mandate also fails.

1. Relief Under § 706(1) Depends on Whether a Duty Is Mandatory, Not on Its Specificity.

As noted at the outset, § 706(1) review must be premised on a statute creating a mandatory, non-discretionary duty. Here, such a duty certainly exists. As the Tenth Circuit put it:

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[22] In any event, even if BLM's flawed interpretation were correct and a § 706(1) claim must seek to compel a final agency action, the non-impairment claim dismissed by the district court would nevertheless survive here, because the actions sought to be compelled – orders to take action closing areas to ORVs or limiting their use to prevent impairment – would be final agency action. The same is true of SUWA's claim under the San Rafael LUP and its NEPA claim, as discussed below. *See infra* at 43-44, 49-50.

> The BLM's argument . . . misses the narrow jurisdictional issue presented on appeal, *i.e.*, whether the BLM has a nondiscretionary, mandatory duty that it may be compelled to carry out under § 706(1). Neither side seriously disputes that the BLM has such a duty under the FLPMA, which mandates that the BLM manage WSAs in such a way as not to impair their wilderness values. *See* 43 U.S.C. § 1782(c).

Pet. App. 13a.

By its plain terms, § 706(1) applies to *any* failure to act in the face of a mandatory duty, such that "agency action [is] unlawfully denied or unreasonably delayed." Nothing in that language refers to the *specificity* of the mandatory duty, requires it to be ministerial, or precludes resort to § 706(1) when the agency has some discretion *how* to comply with the duty. Nor does § 551(13)'s definition of "agency action" narrow the scope of § 706(1) to apply only to highly specific duties, as BLM seems to argue. As explained above, Congress intentionally defined "agency action" in the broadest possible terms. *Supra* at 16, 20. In any event, the fact that the definition includes a number of specific actions that agencies may take or fail to take ("rule, order, license, sanction, relief . . . .") says nothing about the specificity of the *duty* to be enforced under § 706(1), much less that in order to be enforceable a statute imposing a duty must state the precise agency action required to comply.

Jurisdiction to enforce statutory mandates thus extends to more general mandates to act, regardless whether they leave room for agency discretion concerning *how* to comply. For example, in *Cobell*, the D.C. Circuit, per Judge Sentelle, observed that the Department of the Interior has significant discretion in carrying out certain fiduciary duties imposed by statute and common law, but rejected the agency's argument that this discretion barred the court from enforcing those broad fiduciary mandates with an appropriate injunction. 240 F.3d at 156, 159, 167-70. The court held that the

agency's violation, through inaction, of its mandatory duty could be reviewed and corrected under § 706(1), even though the law does not specify any particular steps to be taken. *Id.* at 165-66.

That § 706(1) extends to enforcing mandatory duties that are stated in general terms is further confirmed by the section's express authorization of orders compelling actions "unreasonably delayed." An agency's general duty (in the absence of a statutory deadline) to act on matters before it within a "reasonable time," *see* § 555(b) – though mandatory – is the very opposite of a highly specific or ministerial function that excludes all discretion. *See supra* at 26 (reasonableness of agency's delay reviewed deferentially under multifactored *TRAC* analysis). Yet § 706 leaves no room for doubt that a court can compel an agency to comply with the generalized "unreasonably delayed" standard, as BLM concedes. *See, e.g.*, BLM Br. 17, 20, 24-26, 35.

The drafters of the APA were not unaware of the relationship between discretion and reviewability. They addressed that relationship in creating an immunity from review for matters "committed to agency discretion by law." § 701(a)(2). But BLM does not invoke that exception because it cannot argue that *whether* to prevent impairment is committed to its discretion by law. The mandatory nature of BLM's duty is fleshed out by FLPMA itself, which "explicitly states how the land is to be managed," 6 Op. Off. Legal Counsel at 64, and by the further specifications in BLM's binding IMP. Indeed, the notion that the duty at issue here is "general" rather than "specific" is itself only true up to a point; BLM has some discretion about how to prevent impairment, but a court certainly has the ability to decide whether the agency has done so in a given case. In effect, BLM is trying to escape such review simply because it has *some* discretion in how to comply. That novel exception

finds no warrant in the APA.[23]

2. Pre-APA Mandamus Practice Confirms That Courts Can Compel Compliance with Duties That Afford Room for Discretion.

Lacking support in the APA for its position that only very specific duties can be enforced under § 706(1), BLM turns instead to pre-APA mandamus practice, which, according to the Attorney General's Manual, "appears" to have been codified by § 706(1). A.G.'s Manual at 108; *see also Darby v. Cisneros*, 509 U.S. 137, 148 n.10 (1993) (giving "some" weight to Manual). But the sources on which BLM relies undermine rather than support its argument.

As an initial matter, Congress's own legislative reports and the Attorney General's Manual make clear that "in matters of administrative discretion" a "court may require agencies to act but may not under [§ 706(1)] tell them how to act." Senate Comm. on the Judiciary, 75th Cong., Administrative Procedure Act 40 (Comm. Print 1945); *see* A.G.'s Manual at 108 (explaining that under § 706(1) a court can compel an agency *either* to perform "ministerial" actions *or* to "take action upon a matter, without directing how it should act"). Thus, agency discretion in how to comply with a duty does not affect jurisdiction under § 706(1).

The two mandamus cases cited as illustrations by the Manual, at 108, also demonstrate that courts may enforce mandatory but general duties. In *Safeway Stores v. Brown*, 138 F.2d 278 (Emer. Ct. App. 1943), the court stated that "mandamus will lie ... even though the act required involves the exercise of judgment and discretion." *Id.* at 280. And in *Humboldt*, 224 U.S. 474, this Court held that mandamus lies to compel an agency to exercise jurisdiction over a

[23] As the Tenth Circuit observed, "BLM appears at times to assume erroneously that because it possess discretion over the *implementation* of the nonimpairment mandate, the nonimpairment obligation is itself wholly discretionary." Pet. App. 14a.

party, without specifying what actions the agency should take after having done so. *Id.* at 485. *Humboldt* also held that mandamus is proper when an agency's inaction rests on "a misunderstanding of law," *id.* at 484 – like BLM's theory that it has no legal duty to prevent the impairment here. As *Humboldt* recognized, an agency's failure to act due to legal error must be reviewable, lest the agency have "the power to nullify its most essential duties." *Id.* at 484.

Thus, as Chief Justice Taft explained in another case, mandamus "cannot be used to compel or control a duty in the discharge of which by law [an officer] is given discretion" – but such a "duty may be discretionary *within limits.*" Where discretion is thus limited, the officer "cannot transgress those limits, and if he does so, *he may be controlled by injunction or mandamus to keep within them.*" *Work v. United States ex rel. Rives*, 267 U.S. 175, 177 (1925) (emphasis added); *see also id.* at 184 ("there is a class of cases in which a relator in mandamus has successfully sought to compel action by an officer who has discretion concededly conferred on him by law").

Ultimately, BLM is forced to acknowledge that under pre-APA mandamus practice a court could compel an agency to act in compliance with a mandatory duty so long as the court did not tell the agency how to exercise whatever discretion it possesses. BLM Br. 24-26. But BLM then asserts that any such application would require a court to direct the agency "how to act" and thus "would almost inevitably require a court to substitute its judgment and discretion for those of the agency." *Id.* at 26-27. BLM offers no explanation for this conclusion, nor is there one. Nothing prevents a court from issuing a declaration or order requiring agency action to comply with the law without specifying what that action should be, and SUWA's complaint plainly left room for such relief. *See, e.g., Humboldt*, 244 U.S. at 485 (affirming order compelling ICC "'to take jurisdiction of said cause and proceed therein as by law required'"); *see also*

infra at 38-39 (discussing role of court's equitable discretion).[24]

D. That BLM Took Some Action – Short of Final Affirmative Agency Action – Did Not Render Its Failure to Act Unreviewable.

1. Section 706(1) Applies to Partial Inaction.

Having conceded that a court can compel an agency to comply with a mandatory duty that leaves some scope for agency discretion, BLM echoes the ORV Groups' main contention by attempting to limit that rule to cases in which the agency "fails to act *at all*." BLM Br. 35. The authorities BLM cites – the Attorney General's Manual and *Work*, 267 U.S. 175 – offer no support for such a limitation.[25] And the proposed limitation is contrary to the APA itself.

Reviewable agency action specifically includes *partial* failures to act. § 551(13) (defining "agency action" to include "the whole or a part of a[] . . . failure to act"). Indeed, the chief complaint in many § 706(1) cases is that the agency's preliminary actions have gone on far too long. *See, e.g., Nader v. FCC*, 520 F.2d 182, 206 (D.C. Cir. 1975) (ordering agency, after 10-year delay, to complete "an interminable proceeding, the principal function of which has been that of a giant regulatory wastebasket") (quotation marks omitted); *In re Bluewater Network*, 234 F.3d 1305, 1308, 1315-

[24] In any event, pre-APA mandamus practice was arcane, internally inconsistent, and rapidly evolving before the APA's broad remedy made further evolution unnecessary. *See* Peter L. Strauss *et al., Gellhorn & Byse's Administrative Law* 1118 (9th ed. 1995). Nothing in the APA or its history suggests that in enacting the straightforward language of § 706(1), Congress wanted to maintain every subtle nicety of All Writs practice. The APA was, instead, "meant to bring uniformity to a field full of variation and diversity." *Dickinson v. Zurko*, 527 U.S. 150, 155 (1999).

[25] *Work* did hold that mandamus cannot be used to review an order constituting *final* agency action, 267 U.S. at 255, but that neither supports BLM's position that *any* action precludes § 706(1) jurisdiction, nor conflicts with the exercise of that jurisdiction here. *See infra* at 33.

16 (D.C. Cir. 2000) (ordering agency to issue unreasonably delayed rules, even though it already "ha[d] episodically engaged in some rulemaking" under relevant provision); *Cobell*, 240 F.3d at 1107 (affirming order for agency to comply with fiduciary mandates, even though agency "ha[d] made significant steps toward the discharge of the federal government's fiduciary obligations"). Similarly, here, where the duty at issue is result-oriented – requiring preservation of the wilderness character of designated places – it makes no sense to suppose that half steps that fail to produce that result would preclude judicial review.

In arguing that any action at all precludes § 706(1) review, BLM and the ORV Groups fail to distinguish between cases in which the agency has taken some tentative action short of final affirmative agency action – such as BLM's meetings with ORV user groups to urge them to exercise restraint – and cases in which the agency has taken affirmative agency action that is itself final and reviewable – such as BLM's LUP amendment, adopted *after* this case commenced, closing parts of the Moquith Mountain WSA to ORVs. In the former case, an agency's failure to act cannot be made unreviewable merely because the agency has taken some non-final actions. That would create the no-man's-land where the agency could violate the law but permanently preclude judicial review simply by taking some action that is not final – a jurisdictional gap foreign to the APA.

In contrast, if an agency addresses a problem through *final* affirmative action, a dissatisfied party must obtain review of that final action under § 706(2), not § 706(1), because a final order addressing an issue negates the threshold requirement of § 706(1) review – a final failure to act, whether in whole or in part. In the present case, however, BLM steadfastly refused to take any such definitive action until after SUWA brought suit. *Supra* at 11-12 & n.13.

2. BLM's Post-Complaint Actions Do Not Moot SUWA's Claims, Nor Would Mootness Support BLM's Sweeping Position on Reviewability.

After SUWA commenced this review proceeding, BLM did at long last take several more definitive actions to address the ORV crisis in the four WSAs at issue – thus providing a graphic illustration of the value of judicial scrutiny of inaction under § 706(1). Although neither BLM nor the ORV Groups note the issue, BLM's post-complaint actions pose the question whether SUWA's § 706(1) claim to enforce FLPMA's non-impairment mandate in these WSAs has become moot, since the agency has attempted to comply with that mandate and has taken actions that are, at least arguably, final and reviewable under § 706(2).

The Tenth Circuit did not decide this question, but did instruct the district court to consider mootness on remand. Pet. App. 31a n.17. This Court should likewise refrain from resolving the mootness issue, especially as the issue has not been argued by BLM.

The mootness question is not straightforward. As the Tenth Circuit correctly observed, *id.*, BLM's voluntary cessation of its inaction would not moot SUWA's claim, unless BLM can "meet the heavy burden of proving that the wrong will not be repeated," which BLM has never yet attempted to do in this case. *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1007 (D.C. Cir. 1997) (quotation marks omitted); *accord Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Where an agency has long been recalcitrant in the face of its duty, a court may retain jurisdiction and enter appropriate declaratory or injunctive relief, notwithstanding sudden agency action once judicial scrutiny is brought to bear. *E.g., Ctr. for Auto Safety*, 793 F.2d at 1353-54. In addition, here it is open to question whether BLM's emergency closure orders for three of the WSAs, issued under the authority of 43 C.F.R. § 8341.2, are in fact actions that SUWA can challenge under § 706(2) as not going far enough – because the prerequisite for closure under that regulation is a determination *by BLM* that there is an emergency situation. Accordingly, SUWA's claim very likely is not moot – but in any event these fact-bound questions should be resolved in the first instance by the lower courts.[26]

Most importantly, even if BLM's post-complaint closure orders did moot SUWA's § 706(1) non-impairment claim as to the four WSAs – because review is now available under § 706(2) – that certainly would not support BLM's sweeping theory that FLPMA's non-impairment mandate can *never* be enforced under § 706(1), nor its fallback position that *some* tentative, non-final actions by the agency can eliminate jurisdiction.

E. Enforcement of the Non-Impairment Duty Does Not Interfere with BLM's "Day-to-Day" Activities.

Finally, BLM suggests that judicial enforcement of mandatory duties must be barred to prevent courts from supervising and disrupting the routine operations of federal agencies. But the APA contains explicit limitations that prevent the feared opening of the floodgates, and courts also possess equitable discretion to minimize disruption.

1. The APA Appropriately Limits Judicial Review.

As noted above, the APA contains three express limits on judicial review of agency action. *Supra* at 18. Congress correctly concluded that these limits suffice to cabin the role of federal courts in § 706(1) inaction cases.

For example, Judge McKay in his partial dissent asserted that exercising jurisdiction under § 706(1) here would mean that "any individual unhappy with the INS' efforts to prevent entry of all illegal aliens" into the United States could sue to compel the INS to "enforce" the immigration laws.

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[26] This Court may decide the issue of the lower courts' jurisdiction under § 706(1) at the time the complaint was filed without resolving the mootness issue at this juncture. *See, e.g., Laidlaw*, 528 U.S. at 170-71.

Pet. App. 44a (McKay, J., dissenting in part). Even under the dubious assumption that the requirement of *final* inaction were met under Judge McKay's hypothetical, such a claim would still not be reviewable, both because whether to bring proceedings to "enforce" immigration laws would appear to be "committed to agency discretion by law," *see Heckler*, 470 U.S. at 832, and because "any individual unhappy with the INS's efforts" would have at most an abstract grievance, not the concrete and particularized injury required for Article III standing.

More fundamentally, a § 706(1) claim must be premised on a law creating a mandatory duty requiring action. *See, e.g., Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449, 456-57 (1999) (noting that where regulation did not mandate but merely permitted action, relief under § 706 is not available to compel action). The typical statute that merely *authorizes* regulators to act and directs them to pursue certain goals when they act cannot be invoked to force an action by an agency – at least absent truly egregious circumstances. *See Heckler*, 470 U.S. at 833 n.4. Section 706(1) applies when Congress has imposed a mandatory duty that *requires* the agency *to act*.

2. The Intrusions Imagined by BLM Are Illusory.

BLM nonetheless suggests that, as a practical matter, § 706(1) jurisdiction impinges on agency prerogatives. For example, BLM asserts that parties will circumvent agencies and go directly to court, and it faults SUWA for not petitioning for a rulemaking here. BLM's criticism is misplaced. SUWA is not seeking a rule of general applicability, but action preventing impairment of the wilderness suitability of four specific WSAs, and SUWA did present those concerns to the responsible BLM officials. *Supra* at 8; *cf. Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1040 (D.C. Cir. 2002), *modified on reh'g on other grounds*, 293 F.3d 537 (D.C. Cir. 2002). More generally, under § 704 of the APA judicial review may not be denied for failure to exhaust agency procedures *except* where so provided by statute or an appropriate regulation. *Darby*, 509 U.S. at 143-47. The APA's prohibition of judicially created exhaustion requirements applies equally under § 706(1) and § 706(2). No statute or regulation requires exhaustion here.[27]

BLM carefully states that when a party does petition the agency, the agency is required only to "issue a decision on the request *to the extent the agency deems appropriate*." BLM Br. 29 (emphasis added). And BLM further contends that judicial review will *not* be available *unless* the agency chooses to respond. *Id.* Thus, on BLM's view, a party must petition the agency, but if BLM chooses not to respond, then judicial review remains unavailable. At bottom, BLM's professed concerns about bypassing the agency are really just another stratagem to preclude *any* judicial remedy for its failure to prevent impairment as required by FLPMA.[28]

BLM also appears to argue that judicial review must be barred because courts will overstep their bounds and begin micromanaging agency activities. BLM Br. 26-27. But § 706(1) neither requires nor permits courts to substitute their discretion for that assigned to the agency by law. It is undisputed that if BLM took final *affirmative* action that impaired the wilderness suitability of a WSA, a court could review and set that action aside as contrary to law, without in any way trenching on the agency's lawful discretion.

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[27] The Interior Department does have a regulation requiring exhaustion of inaction claims concerning *Indian lands*, 25 C.F.R. § 2.8 ("Appeal from inaction of official"), but none for BLM or the lands it manages.

[28] Even if one recognizes that BLM, like other agencies, has a general duty to act on matters presented to it within a "reasonable time," § 555(b), BLM's argument would transmute SUWA's right to judicial review to enforce FLPMA's non-impairment mandate today – before further irreparable destruction occurs – into a mere claim to compel BLM to rule on a petition for relief at some "reasonable time" in the future, with all the delay and continuing impairment that entails. Congress did not authorize such a barrier to timely review. § 704.

Similarly, when BLM's final inaction causes unlawful impairment, the court can issue a general declaratory or injunctive order to compel the agency to comply with the statutory mandate, again without trenching on the agency's lawful discretion.[29]

To the extent that the agency's interpretation of a statute, its findings of fact, or its other determinations would be entitled to deference when reviewed under § 706(2), the same deference would apply under § 706(1). In this case, for example, the court should review BLM's interpretation of the non-impairment standard in the IMP under the deferential *Chevron* two-step framework. Here, the court must also take into account BLM's concession that there was ongoing impairment caused by ORVs in the four WSAs at issue. Cert. Opp. App. 57; *see also, e.g., Cobell*, 240 F.3d at 1089-90 (admission by agency that fiduciary obligations were not satisfied). Of course, in some § 706(1) cases the agency will not have compiled an administrative record, made findings of fact or other determinations, or exercised the discretion it lawfully possesses. But an agency cannot turn its unlawful failure to act into a shield against judicial review of that very failure merely because the agency's inaction also means there is little or no administrative record.

BLM also ignores the important role played by the judiciary's equitable discretion in preventing undue intrusion into agency affairs. Just this Term, the Court rejected artificial limitations on federal court jurisdiction to enforce consent decrees against sovereign States. *Frew ex rel. Frew v. Hawkins*, 124 S. Ct. 899, 904-06 (2004). The Court observed that protection of the "sovereign interests and accountability of state governments" lay not in contracting federal court jurisdiction, but "in the court's equitable powers." *Id.* at 905. The same is true here. Courts can readily accommodate the

[29] Of course, the court could also enter a more specific *preliminary* injunction where necessary to prevent irreparable harm *pendente lite*.

executive interests and accountability of federal agencies by using the courts' own equitable discretion in shaping relief. *Abbott Labs.*, 387 U.S. at 154-56. For example, a court might enter declaratory but not injunctive relief or tailor injunctive relief to the circumstances presented. In the rare instance in which a court exceeds the proper bounds of its jurisdiction, the error can be corrected through the appellate process or, in an appropriate case, mandamus to the lower court. *E.g., Cobell v. Norton*, 334 F.3d 1128, 1138-40 (D.C. Cir. 2003).[30]

3. Notwithstanding BLM's Rhetoric, the Court's Decision in *Lujan* Supports Review.

The propriety of review here is also highlighted by *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). BLM repeatedly invokes *Lujan*, both directly and by stating again and again that the issue here is judicial intrusion into "day-to-day," "ongoing," or "programmatic" agency affairs. But that rhetoric is untethered to the actual facts or legal issues in this case. Jurisdiction under § 706(1) no more injects the courts into an agency's day-to-day management than does review under § 706(2). In each case, the court simply determines whether the agency's final action or inaction satisfies congressionally imposed requirements and, if not, enters a remedial order requiring the agency to come into compliance – without usurping the agency's discretion.

BLM's invocation of *Lujan* is thus inapposite. In the part of *Lujan* that discusses "programmatic" challenges, the Court assumed *arguendo* that the plaintiffs had standing to

[30] The Tenth Circuit stated in dicta that under § 706(1), a court may exercise its equitable discretion only at the contempt stage, rather than in fashioning injunctive relief in the first place. Pet. App. 21a-23a & n.14. Other courts have exercised discretion concerning the initial relief to be granted. *E.g., Cobell*, 240 F.3d at 1108; *In re Barr Labs., Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991). This particular dispute is not presented in this case; the courts are in agreement both about the existence of § 706(1) *jurisdiction* and about their power to exercise equitable discretion at some remedial stage of the proceedings.

challenge BLM's actions affecting one parcel of land, but held that the plaintiffs could not leverage that hypothetical standing to challenge actions affecting *over 1250 additional parcels* nationwide – with no connection to the plaintiffs – simply by asserting that the actions were all part of the same "program." 497 U.S. at 892-93. Here, in contrast, SUWA is challenging BLM's final inaction causing impairment in four specific WSAs used by SUWA's members who are directly harmed by the areas' impairment.

Most importantly, *Lujan* stressed that the actions challenged in that case would not have any real-world effects "until some further agency action *or inaction* more immediately harming the plaintiff occurs." 497 U.S. at 892 (emphasis added). The Court added that judicial review would be available when a final action (which includes inaction) "has an actual or immediately threatened effect." *Id.* at 894; *accord Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733-34 (1998); *Peterson*, 228 F.3d at 568-69. This case is an example of just what the Court had in mind: focusing on particular WSAs, SUWA alleged and proved ongoing irreparable harm being caused by final agency inaction.

II. Actions Required by Land Use Plans Are Enforceable Under § 706(1).

Section 706(1) also authorizes courts to compel BLM to comply with provisions of LUPs that require BLM to take certain actions. Two specific LUP provisions are at issue here: (1) BLM's commitment in the 1991 San Rafael LUP to designate, by 1992, the particular routes open to ORVs; and (2) BLM's commitment in the 1990 Henry Mountains LUP to monitor ORV use in the Factory Butte area to determine whether it should be restricted. Pet. App. 25a. When this case was filed – years after these two commitments were made – BLM had complied with neither one. *Supra* at 8.

A. Under FLPMA, BLM Has a Mandatory Duty to Carry Out Actions Required by LUPs.

FLPMA mandates that BLM "shall manage the public lands . . . in accordance with . . . land use plans." 43 U.S.C. § 1732(a). BLM's regulations likewise provide that "[a]ll future resource management authorizations and actions . . . shall conform to the approved plan." 43 C.F.R. § 1610.5-3(a).[31] By creating binding requirements, LUPs "guide and control future management actions" for discrete areas of public lands. *Id.* § 1601.0-2. Thus, under the plain terms of FLPMA and its implementing regulations, when an LUP provides that BLM must perform some action, the agency has a mandatory duty to "manage . . . in accordance with" the LUP by performing the action. That is the kind of mandatory duty that can be compelled under § 706(1) when – as here – BLM violates the duty through final inaction.

Of course, not every provision of an LUP requires BLM to act. LUPs may include aspirational goals, as well as requirements that apply only in the event that BLM chooses to initiate or approve some future action. In such instances, FLPMA's stipulation that BLM manage in accordance with the LUP does not impose a mandatory duty enforceable under § 706(1) because the LUP itself does not require action.

But that is not the case with the two LUP provisions at issue here. The San Rafael LUP obligates BLM to designate ORV routes by 1992, so BLM must make such designations in order to manage according to that plan. Similarly, because the Henry Mountains LUP provides that the Factory Butte area "will be monitored and closed if warranted," CA10 App. 164, the only way BLM can "manage the public lands . . . in accordance with" that LUP is to perform the

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[31] *See also id.* § 1601.0-5(b) ("'Conformity or conformance' means that a resource management action shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment").

promised monitoring and close the area to ORVs if warranted.[32]

Notwithstanding FLPMA's plain language, BLM asserts that the statute "prevent[s] BLM 'from approving or undertaking affirmative projects inconsistent with its land use plans,'" but does not require BLM to comply with LUP obligations to take action. BLM Br. 45 (quoting Pet. App. 49a (McKay, J., dissenting in part)). But as Judge Ebel observed for the majority below, that assertion conflicts with FLPMA's text, which "simply and straightforwardly declares, '[t]he Secretary shall manage the public lands . . . in accordance with the land use plans developed by him.'" Pet. App. 29a (quoting 43 U.S.C. § 1732(a)).

In addition, BLM's position would create a one-sided right to review that is foreign to both FLPMA and the APA. For example, the San Rafael LUP balances conflicting interests by allowing ORVs in the covered area, but restricting them to specific ways once such ways are designated. Under BLM's theory, ORV users would be able to challenge any designation of routes that closed areas to them, because that can occur only through an "affirmative project," but SUWA could not challenge the failure to carry through on the commitment to designate routes by 1992 and thereby restrict ORV use.[33] Nothing in FLPMA or the APA remotely suggests that Congress intended to provide judicial remedies for people whose activities are curtailed by measures to

[32] BLM quotes provisions from a number of *other* LUPs to suggest that they are subject to funding or other limitations. BLM Br. 42 & n.18. But the LUPs quoted by BLM are not at issue in this Court, and BLM cites no such language in the two planning documents that are at issue.

[33] Similarly, under the Henry Mountains LUP, the Factory Butte area will stay open to ORV use unless and until BLM does something affirmative to close it, CA10 App. 164 – at which point the ORV users could challenge the closure. In contrast, by reneging on its commitment to monitor and close the area if warranted, BLM is not undertaking any such affirmative project, so that BLM's view eliminates review on a one-sided basis.

protect public lands, but not for individuals who are harmed by BLM's failure to take mandatory environmentally protective measures. FLPMA requires BLM to manage these areas in accordance with all LUP provisions, including those that require action to protect against the devastation wreaked by ORVs.

B. LUPs Are Not the Purely Programmatic, Voluntary, and Contingent Documents BLM Claims.

BLM tries to bolster its contention that affirmative obligations in LUPs are non-binding by characterizing LUPs as purely programmatic, voluntary, and contingent. To that end, BLM quotes snippets out of context from *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998), and asserts that the case stands for the general proposition that "such plans, in and of themselves, 'do not command anyone to do anything or to refrain from doing anything' . . . and 'create no legal rights or obligations.'" BLM Br. 43 (quoting 523 U.S. at 733).

Ohio Forestry did not state that *all* LUP provisions lack direct legal force, as BLM's selective quotations imply. It stated only that the *specific* "provisions of the Plan that the Sierra Club challenge[d]" in that case did. 523 U.S. at 733. The forest plan in *Ohio Forestry* set logging goals, selected areas suited to timber production, and determined probable methods of cutting, but – critically – it "d[id] not itself authorize the cutting of any trees," *id.* at 729, "nor d[id] it abolish anyone's legal authority to object to trees being cut," *id.* at 733; *see also id.* at 734 (stressing that Sierra Club would "have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain"). The Court recognized that other kinds of plan provisions – including provisions opening or closing specific areas to ORVs – can and do have such direct and immediate effects. *Id.* at 738-39.

That is certainly true of LUPs adopted under FLPMA.[34]

[34] The plan in *Ohio Forestry* was governed by the National Forest

BLM's regulations require LUPs to designate areas as either "open," "limited," or "closed" to ORVs. 43 C.F.R. § 8342.2(a); *see also* Exec. Order No. 11644 (requiring such designations); Exec. Order No. 11989 (same). Approval of an LUP "constitutes formal designation of . . . [ORV] use areas." 43 C.F.R. § 8342.2(b); *see also id.* §§ 8341.1(b) & 8340.0-7 (prohibiting operation of ORVs contrary to such designations and providing for arrest and imprisonment of violators). Thus, ORV designations in BLM's LUPs – unlike the specific logging provisions in *Ohio Forestry* – have immediate legal effect and real-world impact. Another regulation cited by BLM makes clear that this kind of immediate and mandatory duty is a "final implementation decision," in contrast to those obligations that require "further specific plans, process steps, or decisions" before taking effect. *Id.* § 1601.0-5(k).

Relying on the fact that LUPs are "dynamic tools," BLM also argues that enforcing their requirements would place the agency in an "administrative straight-jacket." BLM Br. 44 (quotation marks omitted). That is incorrect. FLPMA specifically permits BLM to amend or revise LUPs at any point. At the same time, it ensures accountability by eliminating the agency's "discretion" to ignore properly adopted plans without formal amendment or revision. Under FLPMA, BLM must first prepare an LUP through a process that involves the public and state and local governments, and BLM must thereafter adhere to the resulting plan unless and until it is amended or revised through a formal process in which the public again has a right to participate. 43 U.S.C. §§ 1712, 1732(a); 43 C.F.R. §§ 1610.5-4 to -6. If BLM were free simply to ignore LUP requirements, as the agency claims, it could make *de facto* amendments without going through the public process required by FLPMA; without undertaking the environmental analysis required by NEPA,

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Management Act, not FLPMA. *See* 523 U.S. at 728-29.

see infra at 46-50; and without providing a reasoned basis for its action, as required by the APA, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983).

Compelling BLM to perform acts required by adopted LUPs thus does *not* "intrude into BLM's discretion with regard to land use planning and management," BLM Br. 44, because that discretion must be exercised in the planning process, not by ignoring an adopted plan.

C. BLM's Failures to Act as Required by the LUPs Were Final When This Case Was Filed.

Because BLM has a mandatory duty under FLPMA to take actions required by LUPs, the agency can be compelled to comply with that duty if it fails to act and its inaction is final. That is the case here.

The 1991 San Rafael LUP limited ORV use to "designated" roads and trails to stem the ecological destruction caused by ORVs in that area, and committed the agency to complete the actual designation of such routes by 1992. Yet those designations still had not been completed *seven years* later when SUWA filed this case in 1999. In the interim, ORVs were allowed to range over the San Rafael area uncontained by designated routes, causing long-term harm to the fragile area.

Similarly, the Henry Mountains LUP committed BLM to implement its monitoring program in 1990, but BLM still had not done so when this case was filed. As BLM explained in the plan, the monitoring was "a prerequisite to accomplishing the protection objectives associated with the various ORV designations." CA10 App. 176. Those "protection objectives" were never realized, because BLM never carried out the "prerequisite" monitoring. As a result, intensive ORV use continued through the 1990s in the Factory Butte area, scarring the landscape with a dense web of tracks, while BLM failed to take stock of or respond to the crisis. Ex. 3G, Prelim. Inj. Hr'g (July 11, 2002) (photograph

of area); CA10 App. 72 (same).

Once SUWA sought judicial enforcement of these duties, BLM finally instituted the long-missing Factory Butte monitoring program and later – in 2003, after the Tenth Circuit ruling on review – completed the San Rafael Route Designation Plan. *Supra* at 12. As noted, the lower courts have not yet addressed whether BLM's post-complaint actions moot any of SUWA's claims. As with the WSA impairment claims, the effects of BLM's voluntary cessation should be addressed by the lower courts on remand.

III. BLM's NEPA Duty To Take a "Hard Look" at Whether It Must Prepare an SEIS Is Enforceable Under § 706(1).

It is undisputed that (1) ORV use has increased dramatically on BLM's Utah lands over the past decade; (2) BLM's earlier NEPA analyses covering the § 202 areas at issue here did not anticipate the current level of ORV use and the resulting environmental impacts; and (3) BLM has never taken a "hard look" to decide whether it must now prepare SEISs addressing the unanticipated impacts. As all three judges on the Court of Appeals agreed, BLM can be compelled to take that hard look and make that determination in light of the changed circumstances. BLM's contrary view conflicts with *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989), with the approach followed by every appellate court to consider the issue, and with the APA itself.

In *Marsh*, the Court unanimously held that NEPA and its implementing regulations impose a mandatory and continuing duty on federal agencies to determine whether new information concerning the environmental impacts of *already approved and ongoing* projects requires a supplemental NEPA analysis. 490 U.S. at 374 ("NEPA . . . require[s] that agencies take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval"); *id.* at 385 ("It is . . . clear that, regardless of its eventual assessment of the significance of this new information, the Corps had a duty to take a hard look at the

proffered evidence"); *see also* 40 C.F.R. § 1502.9(c) (Council on Environmental Quality regulation mandating supplementation); *Marsh*, 490 U.S. at 372 (regulation entitled to substantial deference).

NEPA thus requires an agency to determine whether an SEIS is required when two preconditions exist: (1) "there remains major federal action to occur" and (2) new information arises that could "show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered." *Marsh*, 490 U.S. at 374 (quotation marks and brackets omitted). Indeed, BLM admits that it must determine whether new information concerning an already approved project triggers the duty to prepare a supplemental NEPA analysis whenever the project "has not yet been . . . completed" and "there remains 'major Federal actio[n] to occur.'" BLM Br. 37 (quoting *Marsh*).

Such a statutory mandate "requir[ing] an agency to take specific action when certain preconditions have been met" is a paradigmatic example of the "clear duties to act" that are enforceable under § 706(1). *Thomas*, 828 F.2d at 793. NEPA is a statute that achieves its objectives "through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences and that provide for broad dissemination of relevant environmental information." *Robertson*, 490 U.S. at 350. "By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh*, 490 U.S. at 371. The statutory structure could not work, however, if the hard look requirement were not enforceable in court.

BLM responds here in two ways. First, it makes an argument that was not raised below and was not addressed by the Tenth Circuit – that SUWA's NEPA claims are "divorced from a proposed 'major Federal action.'" BLM Br. 39. If the Court chooses to reach this argument, it should reject it. To

the extent BLM is suggesting that a supplemental NEPA claim must be related to a *new* proposed federal action, that is plainly incorrect because it confuses a more typical initial EIS with an SEIS. In the usual situation, an agency prepares an EIS prior to initiating a major federal action and its NEPA compliance is reviewed in conjunction with any challenge to the final decision to go ahead with the action. In the supplemental context, however, the concern is not with the impacts of a new action but with those of an ongoing action approved in the past. This was the situation in *Marsh*, when the Court considered an agency's decision in 1986 that an SEIS was not required for a dam project that had been approved in 1982 and was already one-third complete. 490 U.S. at 367, 378-79.

The question in the supplemental NEPA context, therefore, is not whether there is some new action being considered, but rather whether there is ongoing major federal action left to occur, such that the agency has "'a meaningful opportunity to *weigh* the benefits of the project [that has already been approved] versus the detrimental effects on the environment.'" *Id.* at 372 (explaining that, "up to that point, 'NEPA cases have generally required agencies to file [EISs] when the remaining governmental action would be environmentally "significant"') (quoting *TVA v. Hill*, 437 U.S. 153, 188 n.34 (1978)); *see also id.* at 374; *Laguna Greenbelt, Inc. v. United States Dep't of Transp.*, 42 F.3d 517 (9th Cir. 1994) (supplemental NEPA challenge to freeway on grounds that post-approval fires in area triggered need for SEIS). And the agency has a duty to take a hard look at whether to prepare an SEIS when significant new information exists.

SUWA's NEPA claims reflect these principles and are fully actionable. SUWA alleged and showed that the original EISs for five BLM LUPs are outdated. Each of those plans was a major federal action that when initially approved made myriad decisions concerning land management, including the decision in each instance to allow unrestricted off-road vehicle travel over hundreds of thousands of acres of federal public land. BLM argues that continuing to manage land under LUPs is not ongoing major federal action, but that is incorrect. As explained above, LUPs govern BLM's *ongoing* land management and on-the-ground activities until the LUP is amended or revised, and thus unquestionably have highly significant environmental impacts. That is why BLM's own regulations require the agency to prepare a full EIS before adopting such a plan. 43 C.F.R. § 1601.0-6. When the relevant circumstances change while a plan is still in force, BLM then has a NEPA duty to consider the impact of that change. Thus, here, where BLM retains the authority to amend its LUPs to restrict ORV use, the agency has the "meaningful opportunity to *weigh* the benefits of the" existing LUP "versus the detrimental effects on the environment," just as *Marsh* requires. 490 U.S. at 372.

BLM's second argument is a return to the theme that only "final agency action" can be compelled under § 706(1). This argument fails at the outset because it erroneously assumes that § 706(1) may not be used to compel mandatory but non-final action. But even if this argument were correct, it would not bar review here because a determination whether to prepare an SEIS constitutes final agency action reviewable under § 706(2).

Marsh recognizes this explicitly. Siding with the government in that case, which freely acknowledged in its briefing that a court may review an agency's decision not to prepare an SEIS, the Court concluded that "review of the narrow question before us whether the Corps' determination that the [existing NEPA analysis] need not be supplemented should be set aside is controlled by the 'arbitrary and capricious' standard of § 706(2)(A)." 490 U.S. at 373-76; *see* Br. for the Pet'rs at 36-37, *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989) (No. 87-1704). That makes sense because a decision not to prepare an SEIS while a major federal action is ongoing is definitive, no subsequent

event must occur before the underlying action can continue, and no subsequent event would provide an opportunity for review. *See Bennett*, 520 U.S. at 177-78. In such a situation, pragmatic considerations dictate that "a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." *Ohio Forestry*, 523 U.S. at 737. In keeping with *Marsh*, appellate courts have, without exception, reviewed under § 706(2) an agency decision not to supplement an environmental analysis. *See, e.g., Colorado Envtl. Coalition v. Dombeck*, 185 F.3d 1162 (10th Cir. 1999); *Laguna Greenbelt*, 42 F.3d at 529-530; *Mass. v. Watt*, 716 F.2d 946 (1st Cir. 1983) (Breyer, J.). It follows that even under BLM's erroneous theory of how § 706(1) operates, a failure to take a hard look at new information relevant to an ongoing major federal action is subject to judicial redress.[35]

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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[35] BLM further complains that the Tenth Circuit did not pay sufficient heed to the agency's alleged fiscal constraints. BLM Br. 39. But in the lone case it cites, *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987), the court took the agency's lack of resources into account when assessing the merits of the Sierra Club's claims and the potential remedy. The case hardly supports BLM's much more dramatic claim that an agency's fiscal constraints may narrow or even do away with federal court *jurisdiction*.

BLM also claims that the Tenth Circuit should have dismissed SUWA's supplemental NEPA claims because of the agency's "assurances" that it would someday perform new NEPA analyses to accompany new LUPs. BLM Br. 39-40. This argument likewise relates to the merits or remedy, not jurisdiction. Moreover, the impropriety of allowing an agency's mere "assurances" to determine federal court jurisdiction is highlighted by BLM's repeated failures to meet these promises. In fact, by the time BLM submitted its "assurances" regarding future planning and NEPA analyses to the Tenth Circuit in its response brief, the agency had *already* missed every single one of the planning deadlines that it was touting, a fact tactfully alluded to by the Tenth Circuit. Pet. App. 38a.

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